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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re D.H., et al., Persons Coming Under the
Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

C.P.,

Defendant and Appellant.

F057541

(Super. Ct. No. JD120008,
JD120009 & JD120010)

OPINION

APPEAL from an order of the Superior Court of Kern County. Peter A.
Warmerdam, Juvenile Court Referee.

Patrick M. Keene, under appointment by the Court of Appeal, for Defendant and
Appellant.

Theresa A. Goldner, County Counsel, and Susan M. Gill, Deputy County Counsel,
for Plaintiff and Respondent.

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C.P. (mother) appeals from the juvenile court's dispositional order declaring her
then six-year-old daughter D. and her two sons, then two- and one-year-old A. and K.

(the boys) (collectively the children) dependents, temporarily removing them from the physical custody of mother and her husband, K.M.P. (K.M.), who is D.'s stepfather and the boys' presumed father, and ordering reunification services.¹ Mother challenges only the removal order, asserting it was not supported by evidence that there were alternatives available short of removal. (Welf. & Inst. Code, § 361, subd. (c)(1).)² We disagree and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The children came to the attention of Kern County Department of Human Services (Department) in January 2009, after it received a referral alleging that K.M. excessively disciplined D. by spanking her barehanded on her buttocks and back for receiving an infraction in school and not being able to correctly spell the word "because." The reporting party stated that D. left the home and spent the night at her aunt's house because she thought her parents were going to kill her.

A police officer responded to D.'s school. D. told the officer K.M. was angry because she brought a notice home from school after she got in trouble there, and he spanked her on the bare buttocks with his hand while they were in the living room. D. said she stayed at her aunt's house because her parents needed a break. The officer observed a dark bruise above D.'s belt line and a large dark bruise, approximately 4 inches in diameter, covering her buttocks. A social worker who later interviewed D. at school likewise saw visible bruising on D.'s lower back, just above the top of her jeans. D. told the social worker she got into trouble the night before because she got a note from school and she was unable to spell a word right, and when she gets into trouble, K.M. spanks her on her bare butt with his hand. When asked how often she gets spanked, D. said she was spanked the day before and twice the week before. D. said the spanking

¹ K.M.P. is not a party to this appeal.

² All further statutory references are to the Welfare and Institutions Code.

occurred in the living room in the presence of mother and D.'s aunt. When asked if she is disciplined in other ways, D. responded that she sometimes gets sent to her room and he "whoops" her there. D. said that sometimes the boys get spanked on their bare butts and hands.

Officers went to the family's apartment, where they contacted K.M. He admitted spanking D., but did not think it was too hard. Another social worker also arrived at the home. The home was in complete disarray. The living room floor was covered with dirt, trash, old food, dirty clothes, dirty diapers and cigarette butts. A beer bottle filled with cigarette butts and ash was on the table. A box of prescription medication was sitting on a stool in the living room, fully accessible to the children. Litter, trash and old food were on the floor throughout the apartment, including the children's bedroom. The social worker was unable to navigate through the living room due to the trash and miscellaneous items. Mother told the officer she saw the spanking and did not think it was excessive. Mother did not see any bruising or injury. Mother claimed the apartment was dirty because she had been sick and unable to clean, and stated the apartment had bed bugs, but the landlord refused to spray for them. Mother told the social worker she was on medication for her bipolar condition. The officer cited mother for child endangerment and arrested K.M.

Both of the boys were in the apartment. A.'s hair was messy and knotted up, and he had what appeared to be an insect bite on one cheek, which mother said was a bed bug bite. K. had some dried food in his hair and numerous scratches on his face, which mother said resulted from K. scratching himself. The social worker saw a small cut on K.'s bottom lip, which mother said happened when he fell and "busted his lip." The children were placed into protective custody.

Four days later, a social worker spoke with mother on the telephone. Mother stated she had not seen any marks on D. from the spanking K.M. had given her. Mother explained that after D. had come home from school with a note from the teacher,

reporting bad behavior, mother told her she would be in trouble if her bad behavior continued. The next day, D. brought home a second note from the teacher. Mother and K.M. were very upset and after they calmed down, they talked to D. Mother claimed K.M. spanked D. four to five times with his hand while her pants were up. Mother did not see any marks or bruises on D. when she helped her change into her pajamas around 7:30 or 8:00 p.m. When asked who normally disciplines the children, mother stated both she and K.M. do. Mother said that sometimes they have the two older children stand against the wall for a short period of time. Mother claimed that given the children's ages, only D. gets spanked, and they both spank her with only their hands.

With respect to the home's condition, mother stated she had been sick and had "let the house go." When asked what medication was in the children's reach, mother said she takes three medications for her bipolar condition. Mother married K.M. in April 2008; he is the boys' father. Mother did not know who D.'s biological father was; mother had married another man three months before D.'s birth who was not her biological father.

At first mother denied ever using illegal drugs. After the social worker told mother a cursory criminal check showed two separate charges for being under the influence, to which she had pled nolo contendere, mother admitted she occasionally used drugs back then, namely methamphetamine. When the social worker again asked when she last used an illegal substance, mother said it had been many years. The social worker told mother the conviction had just occurred in 2006. Mother said that was the last time she had used.

Later that day, the social worker made face-to-face contact with mother and K.M. at their home. K.M. stated he is the boys' father and he has two other children who live with their mothers. K.M. admitted previously receiving services from Child Protective Services (CPS) with respect to the second of these children, R. K.M. knew he had been arrested for spanking D. and for the home's condition. K.M. explained D. had been in trouble twice within the week and he was "only disciplining his child" and he had "only

used his hand.” K.M. denied any allegations of physical abuse with respect to the previous CPS case, but admitted he had tossed a child in the air. K.M. denied ever hitting a child with a belt. K.M.’s drug of choice was marijuana, but he denied current use and claimed the last time he smoked marijuana was when CPS took R.

The social worker interviewed D. D. said “her dad had beat her” by hitting her bottom ten times with his hand. When the social worker asked if anyone had ever hit her any place else on her body, D. said K.M. had hit her on her face with both the front and back sides of his hand. D. said K.M. hit her on the bottom because she brought home an infraction from her teacher the first day and the next day her teacher gave her a note because she had been bad at school. D. said she had a big bruise on her bottom. After K.M. told her she “was going to get a bare butt spanking,” he spanked her in the living room in the presence of her mother and aunt. D. explained that a “bare butt spanking” is where K.M. pulls down her pants and spanks her. D. said both mother and K.M. spank her. According to D., mother kept telling K.M. to stop and said “You can’t hit a child like that.” An intake sheet noted D. had two bruises on the upper buttocks; one was four and half inches and the other five inches. D. also stated that both mother and K.M. smoke “weed,” and the last time she saw them do so was the day before the police came.

D. told the social worker she had spoken to a social worker before when the family was in Las Vegas on D.’s fifth birthday. D. said that mother and K.M. had gotten drunk and were hitting each other; mother broke K.M.’s nose. Although her parents sometimes “play fight,” they were not play fighting on this occasion. D. also said her parents had hit and punched each other when they had gotten drunk at New Years and Christmas.

In January 2002, K.M.’s child, R.P., was adjudged a dependent child under section 300, subdivisions (a) and (b), after R. was removed from him due to general neglect and physical abuse. The court found true allegations that (1) K.M. had thrown four-month-old R. in the air to another person, held R. upside down by her feet, and picked up R. with only one hand; (2) K.M. hit R.’s mother in the face with a closed fist in R.’s presence;

(3) the home was a health and safety hazard, which placed R. at risk of serious physical harm; and (4) R.'s parents were unable to provide regular care due to their substance abuse. K.M. and R.'s mother both received reunification services, including parent training, random drug testing, and counseling for substance abuse, family violence, physical abuse and child neglect, but services were terminated in May 2003, when the court found they failed to participate regularly in any court-ordered treatment program. Parental rights were terminated, R. was adopted, and dependency was terminated.

Dependency petitions were filed on the children on January 21, 2009.³ D.'s petition alleged that she was a child described by section 300, subdivision (b), in that she suffered, or there was a substantial risk she would suffer serious physical harm or illness because of: (1) mother's inability to adequately supervise or protect her as shown by K.M. hitting D. on her bare bottom with his hand, resulting in bruising; (2) mother's willful or negligent failure to adequately supervise or protect D. from the conduct of the custodian with whom D. had been left, based on K.M.'s conduct; (3) mother's willful or negligent failure to provide D. with adequate food, clothing, shelter or medical treatment, as shown by the home being a health and safety hazard; and (4) mother's inability to provide regular care to D. due to her substance abuse.

The boys' petitions contained the same four allegations under section 300, subdivision (b) with respect to mother's conduct. In addition, the petitions alleged: (1) the boys had suffered, or there was substantial risk they would suffer, serious physical harm inflicted non-accidentally upon them by K.M., as he hit their half-sibling, D., on her bare bottom with his hand, resulting in bruising (§ 300, subd. (a)); (2) the boys had suffered, or there was a substantial risk they would suffer, serious physical harm or illness because of K.M.'s willful or negligent failure to provide adequate food, clothing, shelter or medical treatment, based on the home's condition (§ 300, subd. (b)); and (3) the

³ All subsequent references to dates are to dates in 2009.

boys' sibling, R., had been abused or neglected, as defined in subdivisions (a), (b), (d), (e) or (i), and there was a substantial risk the boys would be abused or neglected as defined in those subdivisions.

At the detention hearing, the court declared K.M. the boys' presumed father and ordered the children detained. An uncontested jurisdictional hearing was held on March 4, at which mother and K.M. submitted on the reports. After hearing argument from counsel, the court found true all of the allegations with the exception of the allegations regarding mother's drug use. At the request of mother's attorney, the court continued the dispositional hearing.

By the time of the April 14 dispositional hearing, mother and K.M. had moved from their two-bedroom apartment into a one-bedroom apartment. Both mother and K.M. consistently tested negative for illegal substances. On March 6, a social worker met with mother and K.M. to discuss the case plan, which included parenting and child neglect counseling for both of them, physical abuse - failure to protect counseling for mother, and physical abuse - as a perpetrator counseling for K.M. K.M. stated he was enrolled in the parenting and child neglect class and would enroll in counseling for physical abuse as a perpetrator as soon as the parenting class ended. On March 10, K.M. told the social worker they would be requesting family maintenance at the dispositional hearing, as they would be completing their parenting classes by April 14 and would definitely enroll and complete the other classes that had been ordered. K.M. requested the social worker come for a home visit. On March 19, social workers visited the home and found it to be clean with no health hazards noted. The social worker asked if they had signed up for any classes other than parenting. Mother stated she was waiting to receive her next check to sign up as the center required payment at enrollment. The social worker told her to see if they could enroll with a partial payment.

By March 24, both mother and K.M. had completed the parenting and neglect class. The instructor reported they participated in the class, engaged in class discussion

and were willing to learn new things. On April 6, mother and K.M. advised the social worker they had signed up that day for the classes on physical abuse.

The Department recommended the children be removed from the physical custody of mother and K.M. and the parents given reunification services, since they had not begun to address the issues that brought the children to the Department's attention, as the parents reported as of April 2009 "they had barely attended the intake appointment to enroll in physical abuse counseling" although the social worker had reviewed the initial case plan with them and stressed the need to enroll in this counseling due to the bruises D. received from K.M. three months earlier.

At the dispositional hearing, mother did not present additional evidence, but did ask the court to consider family maintenance services because: (1) mother had completed parenting and neglect counseling and had enrolled in failure to protect counseling, which she had not enrolled in earlier because of money issues; (2) mother had been cooperative with the Department, as her drug tests had all been negative; (3) the physical abuse was related to K.M.'s inappropriate discipline of D. and the parenting class addressed discipline of a child and how to handle a child "more directly than physical abuse counseling would"; and (4) while physical abuse counseling for both parents was appropriate, the children could be returned home safely based on the progress the parents had made to date. Mother's counsel further asserted that mother would be in a much better position to talk to the court about family maintenance in 30 to 60 days and suggested the possibility of a continuance. The court treated this as a request for continuance, which it denied.

K.M.'s attorney asked that, if the court was inclined to grant mother family maintenance, the court also should consider family maintenance for K.M., since they reside together and father was doing well and had started his counseling. The children's attorney stated that D. asked her to tell the court she would like to return to mother's home with K.M. in it, but "[i]f the Court wants to order her to go home on family

maintenance, she would ask the Court to let her go home for weekends.” The children’s attorney submitted on the recommendations, as she still had concerns about K.M. hitting D. and leaving bruises. The Department’s attorney submitted on the Department’s recommendations, stating that while it spoke well for the parents that they had jumped in and started dealing with some of the issues, physical abuse or awareness had not yet been addressed, which was the most critical part of the program, and “mother should have been thinking of the child and not the father in the desires of who needs to be protected.”

The court told the parents that they had done a “pretty good job” up to that point by completing two shorter aspects of their plan that were easier to complete, but the physical abuse component was a significant one and because “we’re not anywhere on that yet, I’m not ready to let these kids go home.” The court explained that if mother completes her program and K.M. is involved regularly in his, it would look favorably on placing the children back home, even if K.M. was still working on his program. The court also advised the Department to begin expanding visits with the children.

The court adjudicated the children dependents under section 300, subdivision (b). The court removed the children from mother’s custody and the boys from K.M.’s custody based on the facts set forth in the sustained petition and social worker report after finding clear and convincing evidence of a substantial danger to the children’s physical health if custody were not removed from their parents and no reasonable means to protect their physical health without removal from their parents’ custody. The court ordered reunification services for both parents. Mother was ordered to participate in counseling for physical abuse, failure to protect, and father was ordered to participate in counseling for physical abuse as a perpetrator. Both were ordered to submit to at least once monthly random drug tests. Supervised visits were ordered to occur twice per week for one hour, but the court stated it expected prompt expansion of those visits.

DISCUSSION

Mother contends the court abused its discretion in removing the children from her custody because the trial court failed to appropriately consider alternatives short of removal from mother's home.

When a parent challenges a dispositional finding, the question is whether substantial evidence supports the finding. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581 [although trial court makes findings by the elevated standard of clear and convincing evidence, substantial evidence test remains the standard of review on appeal].) In resolving this question, we view the evidence in the light most favorable to the trial court's determination, drawing all reasonable inferences in favor of the determination and affirm the order even if there is other evidence supporting a contrary conclusion. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

As relevant here, before the court may order a child physically removed from his or her parent, it must find by clear and convincing evidence that the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1).) A removal order is proper if it is based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136 (*Diamond H.*), disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The parent's level of denial is an appropriate factor to consider when determining the risk to the child if placed with that parent. (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044 [denial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision].) The parent need not be dangerous and the child

need not actually have been harmed before removal is appropriate. The focus of the statute is on averting harm to the child. (*Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536, citing *In re B.G.* (1974) 11 Cal.3d 679, 699.)

Mother does not contend that there is insufficient evidence of a substantial danger to the children's physical health if returned home. Instead, mother argues that the court improperly found there were no reasonable means of protecting the children other than removing them from her custody. She contends that any risk to the children was due to K.M.'s conduct, not her own, as the petitions allege that only K.M. was the perpetrator of the physical abuse; therefore, the children would not be at risk of harm if they were returned to her custody without him in the home. Accordingly, mother asserts the court should have ordered father from the home and returned the children to her. We find no error.

The evidence in this case established K.M.'s physical abuse of D., which mother was either unwilling or unable to prevent or stop. K.M. has a history of abusing others; he lost parental rights to one child due to abuse of that child and domestic violence in the home, has a criminal conviction for spousal abuse, and his pattern of domestic violence was continuing with mother, who joined in the violence. While mother paints herself as a non-offending parent, she was far from it, as she participated in disciplining D. by also spanking her, she was present during the spanking at issue in this case, and although the spanking was serious enough to inflict 4- to 5-inch bruises on D., mother did not think the spanking was excessive, denied that D. was spanked on her bare bottom, and did not see the bruises. From this evidence, the court reasonably could conclude that mother was a participant in the abuse by failing to recognize the seriousness of it and protect D. against it.

Although the parents had moved into a smaller apartment, which they were able to keep clean, nothing had changed with respect to their understanding of the seriousness of

their actions since the children were detained. While mother and K.M. had both completed parenting classes and mother's attorney represented to the court that mother learned discipline techniques in that class, there was no evidence presented that the parenting classes encompassed the issues at the heart of this case, i.e. physical abuse of a child and the importance of protecting against such abuse. Accordingly, the court reasonably could conclude that until mother, who had allowed the abuse to occur and saw it as acceptable, completed her course on physical abuse, the children would be at substantial risk of harm even if returned to her care without K.M. in the home, as her lack of understanding would place the children at risk of harm from others who might abuse them.

The case mother relies on does not compel a different result. In *In re Henry V.* (2004) 119 Cal.App.4th 522, the reviewing court reversed an order removing from his mother's custody a child who had burn marks on his buttocks consistent with a curling iron. (*Id.* at pp. 525-526, 529.) The appellate court characterized the abuse as "a single occurrence," noting that there was "ample evidence" of specific services available to "mitigate the risk of further physical abuse" and there was no indication the juvenile court "understood the necessity of making the dispositional findings on clear and convincing evidence." (*Id.* at pp. 529-530.)

In contrast here, there is evidence that this was not the first spanking D. had received, and there was a risk of a pattern of abuse given K.M.'s history of domestic violence and abuse of his other child, coupled with mother's denial that there was a problem. In addition, the court made its findings based on clear and convincing evidence. We note the court instructed the Department to increase visits and stated it would consider returning the children to their parents once mother completed her class and father had made progress on his.

In sum, we find substantial evidence supports the juvenile court's removal order and therefore uphold the order temporarily removing the children from her custody.

DISPOSITION

The juvenile court's dispositional order is affirmed.

Gomes, J.

WE CONCUR:

Cornell, Acting P.J.

Hill, J.